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No. 82-1579

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

HAYFIELD NORTHERN RAILROAD COMPANY, INC.
Appellant,

and

STATE OF MINNESOTA,
Appellant/Intervenor,

v.

CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY,
Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

JOINT BRIEF OF APPELLANTS

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QUESTION PRESENTED

The question presented is whether 49 U.S.C. §10905 preempts the exercise of sovereign power of eminent domain over an abandoned railroad line where a railroad has abandoned a rail line in Minnesota under the following conditions:

(1) the Interstate Commerce Commission has given its approval,

(2) the ICC has relinquished all jurisdiction and interest in the rail line, and

(3) a statutorily authorized rail company has properly invoked Minnesota condemnation law in order to recommence rail service to citizens in Minnesota.

LIST OF PARTIES

In addition to the captioned parties, the States of Iowa and Wisconsin filed pleadings *amicus* in support of the joint petition of the Hayfield Northern and the State of Minnesota for rehearing and rehearing en banc.

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ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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OPINIONS BELOW

The opinion of the court of appeals (J.S.App., A1-A11) affirming the order of the district court is reported at 693 F.2d 819. The order of the district court granting summary judgment to Chicago and North Western (J.S.App., A13-A16) is not reported.

JURISDICTION

The judgment and opinion of the court of appeals were entered on December 3, 1982. The motion for rehearing, timely filed, was denied on January 18, 1983 (J.S.App., A16-A17). A notice of appeal to this Court was filed on February 22, 1983 (J.S.App., A17-A18). The Jurisdictional Statement was filed and docketed on March 25, 1983. Probable jurisdiction was noted on October 3, 1983. Jurisdiction is conferred on this Court by 28 U.S.C. 1254(2).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Minn. Stat. §222.27 (1982) provides as follows:

> *Power to acquire property* — Every foreign and domestic railroad corporation shall have the power to acquire, by purchase or condemnation, all necessary roadways, spur and side tracks, right of ways, depot grounds, yards, grounds for gravel pits, machine shops, warehouses, elevators, depots, station houses, and all other structures necessary or convenient for the use, operation, or enjoyment of the road, and may make with any other railroad company, such arrangements for the use of any portion of its tracks and roadbeds as it may deem necessary.

Minn. Stat. §300.04 (1982) provides as follows:

> *State and local control; eminent domain* — The state shall at all times have the right to supervise and regulate the business methods and management of any such corporation and from time to time to fix the compensation which it may charge or receive for its services. Every such corporation obtaining a franchise from a city shall

be subject to such conditions and restrictions as from time to time may be imposed upon it by such municipality. Every such corporation may acquire by right of eminent domain such private property as may be necessary or convenient for the transaction of the public business for which it was formed. No street railway company shall have or exercise such right within the limits of any city.

49 U.S.C. §10905 (*Offers of Financial Assistance to Avoid Abandonment and Discontinuance*) is set forth in J.S.App., A-20.

49 U.S.C. §10903 (*Authorizing Abandonment and Discontinuance of Railroad Lines and Rail Transportation*) is set forth in J.S.App., A-25.

Article 6, Section 2 of the United States Constitution provides as follows:

> This Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Article 1, Section 8 of the United States Constitution provides as follows:

> "Congress shall have power . . . [To] regulate Commerce . . . among the several states . . ."

STATEMENT OF THE CASE

I. INTRODUCTION

Appellant Hayfield Northern Railroad Company (Hayfield Northern) and appellant/intervenor State of Minnesota (Minnesota) appeal from the judgment and opinion of the United States Court of Appeals declaring that Minnesota law providing for the taking of abandoned railroad property by eminent domain is preempted by the Interstate Commerce Act (ICA). 49 U.S.C. (Supp. V) 10905.

II. BACKGROUND

This case concerns an abandonment of 19.2 miles of rail line in rural southeastern Minnesota. This rail segment (Hayfield segment) intersects Hayfield. Hayfield lies 25 miles north of the Iowa border, 70 miles south of St. Paul, Minnesota, and 20 miles southwest of Rochester, Minnesota. Hayfield's existence as a farming center (population 1,243) is attributed to Chicago and North Western Transportation Company's (CNW) (originally Chicago Great Western) initiating rail service to Hayfield in 1855, placing of a division point at Hayfield in 1902, and constructing a roundhouse in the 1930's, which has since been closed. In addition to being a farming center, Hayfield is the home of Power-Span, a manufacturer of concrete power poles for the utility industry. These poles may exceed 90 feet in length.

III. THE MINNESOTA STATUTE

Minnesota has delegated to Hayfield Northern the power to condemn abandoned rail lines. Minn. Stat. §§300.04 and 222.27 (1982). This power has been delegated to rail corpora-

tions in Minnesota since 1879. This power may be exercised by any railroad corporation whether a Minnesota citizen or a citizen of a foreign jurisdiction.[1] Similar statutes are found in many states.[2]

IV. THE FEDERAL SCHEME

The Staggers Rail Act of 1980 amended the Interstate Commerce Act (ICA). These amendments changed the procedures for obtaining a certificate of abandonment from the Interstate Commerce Commission by railroads desiring to quit unprofitable lines. The ICA, as amended by the Staggers Act, provides that a rail line subject to Interstate Commerce Commission (ICC) jurisdiction may be abandoned, or operations on that line discontinued, "only if the Commission finds that the present or future public convenience and necessity require or permit abandonment." 49 U.S.C. (Supp. V) 10903. The ICA provides that the ICC shall publish in the Federal Register its finding that abandonment is permissible. "Within 10 days following the publication, any person may offer to pay the carrier a subsidy or offer to purchase the line." 49

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[1] CNW has been delegated this power.

[2] See, e.g., Ala. Code §10-5-1, Alaska Stat. §09.55.240, Ariz. Rev. Stat. Ann. §12-1111, (West), Ga. Code §94-301, Hawaii Rev. Stat. §101-4, Idaho Code §7-701, Iowa Code §371.6, Kan. Stat. Ann. §§26-101 and 66-501, Me. Rev. Stat. Ann. tit. 35, x 651, Md. Ann. Code art. 23, §193, Mass. Gen. Laws Ann. ch. 160, §82, (West), Miss. Code Ann. §77-9-183, Mo. Rev. Stat. §523.010, Mont. Code Ann. §§69-14-513, Neb. Rev. Stat. §74-301, Nev. Rev. Stat. §37.010, N.H. Rev. Stat. Ann. §371.1, N.J. Rev Stat. §48:12-35.1, N.M. Stat. Ann. §42A-2-1, N.Y. Railroad Law §16, N.C. Gen. Stat. §62-220, N.D. Cent. Code §35-15-02, Ohio Rev. Code Ann. §4955.02, Okla. Stat. tit. 66, §51, R.I. Gen. Laws §37-6-26, S.C. Code Ann. 58-17-1200 (Law. Coop.), S.D. Codified Laws Ann. §49-16A-75, Tenn. Code Ann. §65-6-128, Va. Code §56-347, Wash. Rev. Code §81.36.010, W. Va. Code §31-2-2, Wis. Stat. §32.02, Wyo. Stat. §1-26-201.

U.S.C. (Supp. V) Section 10905(c). The Commission is authorized to postpone the issuance of the certificate of abandonment to permit negotiations if a "financially responsible person (including a government authority) has made a reasonable offer of subsidy or purchase." 49 U.S.C. (Supp. V) 10905(d).

If the parties are unable to come to terms, they may request the Commission to establish a price or subsidy. 49 U.S.C. (Supp. V) 10905(e). This request must be made within 30 days of the initial offer (*id.*). Within 60 days of this request the Commission must establish the amount of subsidy or purchase. 49 U.S.C. (Supp. V) 10905 f(1)(A). The Commission's determination is binding (*id.*). However, the offeror "may withdraw his offer within 10 days of the Commission's decision." 49 U.S.C. (Supp. V) 10905 (f)(2). If the offer is withdrawn a certificate of abandonment immediately issues (*id.*). Accordingly, 49 U.S.C. (Supp. V) 10905 requires that a subsidy or purchase to avoid abandonment or discontinuance be reached within 110 days from the date of publication in the Federal Register.[3] Rail property so purchased or subsidized avoids abandonment, and regulated rail service continues. A purchaser who acquires rail property under Section 10905 "may not transfer or discontinue service on the line for two years after the sale and may not transfer the line to anyone other than the transferor carrier for five years after the sale. §10905 (f)(4), (5)" (J.S.App., A6-A7).

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[3] Before the Staggers Rail Act amendments to 49 U.S.C (Supp. V) 10905 there was no provision for the Commission to set terms for subsidy or purchase. See discussion of history of Section 10905, *infra*, at 16-19.

V. FACTS OF CASE

The facts are not in dispute and are set forth in the opinion of the court of appeals (J.S.App., A1-A11).

A. Pre-Abandonment Facts

On January 30, 1981, Chicago and North Western Transportation Company (CNW) filed an application for a certificate of abandonment with the ICC to abandon a rail line, including a 19.2 mile segment (Hayfield segment), which runs through rural Hayfield, Minnesota (J.S.App., A2). This segment lies totally within Minnesota. A local shippers group (Shippers Group) rallied to oppose the abandonment (*id.*).

An Administrative Law Judge determined that the public convenience and necessity permitted an abandonment of the Hayfield line (*id.*). The Shippers Group made an offer to subsidize the line. The Commission found that the Shippers Group was a "financially responsible person" within the meaning of Section 10905(d). Accordingly, the Commission delayed the issuance of the certificate of abandonment as required under the procedures of Section 10905.

The Shippers Group and CNW were unable to come to terms (*id.*). The Shippers Group then asked the Commission to set the amount of subsidy.[4] 49 U.S.C. (Supp. V) Section 10905(e) (*id.*). In its determination of the amount of subsidy, the Com-

[4] "Soon after making the subsidy offer the Shippers Group filed an administrative appeal of the Administrative Law Judge's decision authorizing abandonment. The Commission denied the appeal and the Shippers Group filed a petition for review in . . . [the United States Court of Appeals for the Eighth Circuit] . . . [A]fter unsuccessfully seeking a stay of the order permitting abandonment, the Shippers Group withdrew their appeal of the substantive decision" (J.S.App., A2).

mission calculated the net liquidation value of the Hayfield line to be $1,791,345. See 49 U.S.C. (Supp. V) 10905(d)(2)(A), 10905(f)(1)(B); and 49 C.F.R. §1121.44 (c)(1952) (*id.*). The Shippers Group then withdrew its offer, as was its right under Section 10905(f)(1)(C)(2) (*id.*). The certificate of abandonment issued on November 17, 1981 (*id.*). This abandonment complied with all abandonment procedures required by the Interstate Commerce Act.

B. Post-Abandonment Facts

On March 31, 1982, Hayfield Northern Railroad Company, Inc., (Hayfield Northern), a Minnesota public service corporation with the delegated power to condemn abandoned rail lines for rail purposes under Minnesota law (Minn. Stat. §§300.04 and 222.27 (1982)), was formed by some members of the Shippers Group.[5] Hayfield Northern immediately brought suit in state court seeking injunctive relief to preserve the Hayfield line intact in order to begin condemnation proceedings.[6] Hayfield Northern also sought a temporary restraining order to forbid the CNW from removing the track and appurtenances from the Hayfield line. After hearing Hayfield Northern and CNW, the state court granted Hayfield Northern a temporary restraining order.

CNW removed the suit to the United States District Court for the District of Minnesota and moved to dismiss on the ground that Section 10905 preempts state law authorizing

[5] The Shippers Group and Hayfield Northern are distinct legal entities.

[6] CNW had contracted to upgrade track in Iowa. It planned to salvage and use the Hayfield track in this upgrading program (J.S.App., A3). In early 1983, CNW removed the track from the Hayfield segment.

condemnation of abandoned rail lines for railroad purposes. The State of Minnesota then intervened "to defend the constitutionality of its condemnation law as applied" (J.S.App., A3).

The district court entered summary judgment in favor of CNW, holding that Section 10905 preempts state condemnation. The district court also dissolved the injunction (*id.*).

Hayfield Northern appealed to the United States Court of Appeals for the Eighth Circuit "and moved for a stay pending appeal and an expedited appeal. After argument . . . [the court of appeals] granted the motions upon the posting of a $100,000 bond" (*id.*).

After argument on the merits, the court of appeals affirmed the judgment holding that Section 10905 "preempts Minnesota condemnation law when a Minnesota railroad company attempts to condemn the track and right of way of a properly abandoned rail line in order to continue rail service on that line"[7] (*id.*).

The court of appeals remanded the cause to district court "for a determination of the amount of damages due CNW on account of delay." The court of appeals also dissolved its previously entered stay (*id.*).

The joint petition for rehearing filed by the Hayfield Northern and State of Minnesota was denied on January 19, 1983 (*id.* at A16-A17). The States of Wisconsin and Iowa had supported the petition for rehearing. On January 22, 1983, Hayfield Northern and the State of Minnesota petitioned the court of appeals to stay the mandate. This petition was denied as were the Hayfield Northern's and State of Minnesota's petitions to this Court to stay the mandate. (*id.* at A26-A28).

[7] At the time of the writing of the court of appeals decision, rail service had been discontinued for 10 months, and, therefore there was no service to continue.

SUMMARY OF ARGUMENT

The eminent domain authority of the State of Minnesota may be properly exercised on property that once was a rail line in order to rededicate that property to rail service. This power is left undisturbed by the Staggers Rail Act amendments to the Interstate Commerce Act. The language of the Act supports this conclusion, as does the legislative history. Indeed, the Interstate Commerce Commission agrees: "the disposition of rail property after an effective certificate of abandonment has been exercised is a matter beyond the scope of the Commission's jurisdiction, and within a State's reserved jurisdiction. Questions of title to, and disposition of the property are matters subject to State law." *Abandonment of Railroad Lines and Discontinuance of Service*, 365 I.C.C. 249, 261 (1981). The courts have also assumed that eminent domain authority of a state may be exercised on a rail line after the ICC has relinquished all jurisdiction and interest in the rail line. The court of appeals' decision stands alone in holding that this traditional state power is preempted. This decision is unsound, both in law and in policy. The decision in effect creates a new class of property, abandoned rail property, that is not subject to federal regulation and yet cannot be condemned by a state. The court of appeals' decision undermines eminent domain, an essential attribute of a sovereign state that is "necessary for the proper performance of governmental functions." *Georgia v. City of Chattanooga*, 264 U.S. 472, 480 (1924).

ARGUMENT

I. THE STAGGERS RAIL ACT AMENDMENTS TO THE INTERSTATE COMMERCE ACT LEAVE INTACT THE INHERENT STATE POWER TO CONDEMN PROPERTY THAT USED TO BE A RAIL LINE REGULATED BY THE FEDERAL GOVERNMENT.

Congress has neither expressed nor implied an intent to override a state's sovereign power to condemn for a public purpose, and has not even hinted that abandoned rail property should be exempted or insulated from a State's exercise of its inherent power of eminent domain. The provisions of Minnesota law that the district court and the court of appeals found to be preempted are no less than Minnesota's traditional authority to exercise or delegate the power of eminent domain over real property. Congress left this sovereign power of eminent domain intact when it enacted the Staggers Act amendments to the Interstate Commerce Act.

A. The Language of the Statute Refers Solely to Matters That Occur Before Abandonment.

A railroad abandonment may be defined as the cessation of rail service that "terminates a railroad's public service obligation." *Gibbons v. United States*, 660 F.2d 1227, 1234 (7th Cir. 1981); 49 U.S.C. (Supp. V) 10903. When a certificate of abandonment is effective, the rail provider is relieved of its obligations to provide rail service on the abandoned rail line. Rail line so abandoned loses its character as rail property and becomes ordinary real property. *Common Carrier Status of States*, 363 I.C.C. 132, 135 (1980), aff'd *sub. nom. Simmons v. ICC*, 697 F.2d 326 (D.C. Cir. 1982) ("when a rail

line has been fully abandoned, it is no longer a rail line and the transfer of the line is not subject to our jurisdiction"). Before the Hayfield segment was dedicated to rail use it was mere property, which, like other property, was subject to Minnesota legal process, including the power of eminent domain. When the Hayfield segment was dedicated to rail use in the 1800's, Minnesota ceded its power to the federal government on that line. Now that the Hayfield segment has been removed from interstate commerce by the act of abandonment, this segment is once again mere real property that, like other real property, may be acquired by eminent domain for a public purpose.

Section 10905, evidenced by its heading and its terms, refers to matters that occur before the effective date of abandonment. It provides a vehicle to avoid abandonment. The heading of the statute is particularly edifying: "Offers of financial assistance to avoid abandonment and discontinuance". All events contemplated by Section 10905 occur within the federal regulatory environment, as these events occur before abandonment and before the line is removed from interstate commerce. When the abandonment is effective, ICC jurisdiction ends as there is no rail property to regulate. The court of appeals contended that there is a difference between Commission "jurisdiction" and frustrating the congressional objective in enacting Section 10905 (J.S.App., 10-11). The Solicitor General, however, expressing the view of the United States, found that no "federal or statutory programmatic interest of the United States would be materially affected by the exercise of a state's condemnation powers in this case." Brief of the Solicitor General as *amicus* at the invitation of

the Court to express the view of the United States, at 6. The Solicitor further argues that state condemnation should be allowed on an abandoned rail line (*id.*).

As the discussion under legislative history below demonstrates (*infra* at 16-19), the concern of Section 10905 is to permit rail carriers a prompt and easy exit from unprofitable lines, thereby relieving the carrier from protracted abandonment proceedings and the expense of providing service on unprofitable lines. Section 10905 does extend to the Commission the authority to set terms for subsidy or purchase (see discussion, *supra*, at 6) before the Commission can permit abandonment. This pre-abandonment authority of the Commission, which was enacted for the benefit of local communities like Hayfield, does not mean that the congressional purpose was to insulate rail line from post-abandonment acquisition by the use of state eminent domain authority, forever. Section 10905 does not concern itself with what happens to the track and right-of-way after the certificate of abandonment is effective. After abandonment, the line and appurtenances are a matter of federal indifference.

A state condemnation in this case could not interfere with the efficient abandonment process dictated by the Interstate Commerce Act, since it quite properly would follow the abandonment. Accordingly, the state condemnation desired in this case has no effect on any federal objectives as once the certificate issues the federal interest is at an end until such time a new certificate of public convenience and necessity is issued to run trains again on the Hayfield segment. 49 U.S.C. (Supp. V) 10901. Moreover, there is no evidence of federal design to preempt.

B. Congress' Extension of the Commission's "Exclusive" and "Plenary" Authority Over Abandonments to Include the Authority to Set a Purchase Price on Rail Lines in Order That Those Lines Would Avoid Abandonment and Continue in the Federal Scheme Was Not Intended to Oust the State's Traditional Sovereign Authority to Condemn Rail Lines Which Have Been Abandoned and Thereby Taken Outside the Federal Scheme.

It is readily conceded that the Interstate Commerce Commission has exclusive authority to regulate abandonments. Section 10905, as part of that authority, permits the Commission to set terms for the transfer of rail property before abandonment. Section 10905 does no more than provide "a method for transferring the rail properties prior to their downgrading [i.e. before the line is abandoned]". H.Rep. No. 96-1035, 96th Congress 2d Sess. (1980), reprinted in U.S. Code Cong.Ad. News 3988. It was not the intent of Congress or the purpose of Section 10905 to insulate property that used to be rail line from state eminent domain authority. The legislative history is silent on the effect of Section 10905 on a state eminent domain acquisition after an abandonment under the ICA. Preemption is not to be presumed from this silence. The objective of Section 10905 was not to thwart state eminent domain authority, but to compel railroad good faith bargaining with a financially responsible entity in the hope that abandonment could thereby be avoided.

1. The legislative history of §10905 is silent on its effect on state eminent domain authority, and preemption is not to be presumed.

This Court has warned of the danger of deriving intent through a process of negative inference. *Cleveland v. United States*, 329 U.S. 14, 22 n.5 (1946) (per Justice Rutledge, concurring). Accordingly, " 'an unexpressed purpose to nullify . . . [state power] is not lightly to be attributed to Congress' " *California Retail Liquor Dealers Ass'n v. Medcal Aluminum, Inc.*, 445 U.S. 97, 103-104 (1980), quoting *Parker v. Brown*, 317 U.S. 341, 351 (1943). "Preemption of state law by federal statute [is] not favored 'in the absence of persuasive reasons either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained.' " *Chicago & North Western Transportation Company v. Kalo Brick and Tile*, 450 U.S. 311, 317 (1981), quoting *Florida Lime and Avocado Growers Inc. v. Paul*, 373 U.S. 132, 142 (1963). The silence in this case cannot be read to find a congressional purpose to preempt.

The legislative history indicates that Congress extended the power of the Commission in abandonment matters to include the authority to set terms, for purchase or subsidy, to combat railroad bad faith, and to provide a mechanism in which rail service could continue without interruption. This extension of power to the Commission did not mean that Congress intended to oust the states from exercising eminent domain authority after abandonment. The summary procedures of Section 10905 requiring the Commission to determine value of property from afar in a mere 60 days does not give strength to the conclusion drawn by the court of appeals that Section 10905 provides the exclusive method in which to transfer the rail line. Moreover,

Section 10905 contemplates that a governmental entity may be a party to a Section 10905 valuation. Congress must be assumed to recognize that an appropriation in the short period mandated by Section 10905 could not always be accomplished by a state entity. Accordingly it is difficult to infer that these procedures were the exclusive method for transferring rail line.

Congressional silence on the question of the vitality of state eminent domain authority after Section 10905 was enacted lends strength to the opposite conclusion, i.e. no preemption. Indeed, the very lack of congressional debate on this subject cuts against any inference that Congress intended to preempt. Lack of debate on this fundamental state power contrasts markedly with the *amicus* participation of sixteen states supporting appellants' appeal. Furthermore, the purpose of Congress in enacting Section 10905, as developed below, was not to create a special class of property immune from state eminent domain but to force good faith negotiations between the abandoning railroad and a prospective purchaser.

2. Staggers Act Amendments to Section 10905 were enacted to curb railroad bad faith negotiations with prospective purchasers and to provide a mechanism to transfer the line to the prospective purchaser before abandonment, thereby avoiding an interruption in rail service.

"Entry into and withdrawal from a railroad operation* are events heavily freighted with the public interest and pervasively subject to public regulation." *Gibbons v. United States*, 660 F.2d 1227, 1234 (7th Cir. 1981). In order to protect the public interest from serious injury from the termination of**

rail service, the Commission has been granted authority to provide a method to set terms for the transfer of rail line before service is terminated. 49 U.S.C. (Supp. V) 10905. The Staggers Rail Act amendments to the ICA are the latest congressional effort to add efficiency to the procedure in which a carrier can abandon "unprofitable" lines, while providing a method to protect the public from cessation of rail service. See generally *Simmons v. Interstate Commerce Commission*, 697 F.2d 326 (D.C. Cir. 1982).

The Staggers Act was preceded by the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, Section 802, 90 Stat. 127, 146, originally codified at 49 U.S.C. 1a (4-R Act), which "made significant changes to the procedures by which a carrier was able to abandon service along the rail line." *Simmons v. Interstate Commerce Commission*, 697 F.2d 326, 329 (D.C. Cir. 1982). The 4-R Act amended §1a of the Interstate Commerce Act, the predecessor of 49 U.S.C. 10905, by providing for a short delay before a certificate of abandonment would issue in order to permit interested parties to come forward with offers to continue rail service. See *Chicago and North Western Transportation Company v. United States*, 582 F.2d 1043, 1046-49 (7th Cir.) *cert. denied*, 439 U.S. 1039 (1978). Under the 4-R Act, if the Commission determined that the interested party was "financially responsible" it was empowered to postpone the issuance of the certificate of abandonment for up to 6 months in order that the offeror and the abandoning railroad could reach an agreement on subsidy or purchase, thereby avoiding cessation of rail service (*id.*).

The Commission found that the purpose of the 4-R Act's negotiating provisions was not being served, since railroads negotiated in bad faith and waited for the 6 month period to

pass in order to be able to extract an excessive price or abandon without reaching an agreement of subsidy or purchase with the offeror (*id.*). See also *Chicago and North Western Transp. v. United States*, 678 F.2d 665, 667 (7th Cir. 1982). In order to overcome this problem of railroad bad faith, the Commission adopted rules to meet this problem that gave the Commission the power to refuse to issue the certificate and to reopen the underlying abandonment beyond the 6 month period or directing that service continue for an additional year. *Chicago and North Western Transp. v. United States*, at 582 F.2d 1046-1049.

The Seventh Circuit struck down these Commission rules holding that the Commission had no authority to extend the 6 month period beyond the language of the statute (*id.* at 1049). The court buttressed its holding by noting the absence of a "cram-down" provision in Section 1a. The Seventh Circuit noted the legislative history of this provision at 582 F.2d at 1049, n.9.

> "We note that acting ICC Chairman Charles Klapp recognized that the language of the statute means what it says when, in testifying before a subcommittee of Congress in June 1976, he stated that an amendment to §1a(6) he was supporting
>
> . . . by removing the phrase 'not to exceed 6 months,' gives the Commission the discretion to extend for a longer period of time the issuance of an abandonment certificate if the circumstances of a particular case make such an additional extension reasonable. This amendment addresses the very real problem of a railroad simply refusing to negotiate in good faith for the statutory 6-month period and thus successfully preventing the making of a subsidy agreement.
>
> His amendment would have given the Commission authority to extend the negotiating period but to prescribe terms for continued operation if no subsidy agreement was reached within six months. Hearings on Rail Amendments of 1976 Before the House Subcommittee on Trans-

> portation and Commerce of the House Committee on Interstate and Foreign Commerce, 94th Cong., 2d Sess. 48 (1976). Congress did not accept Chairman Klapp's proposal and was presumably not persuaded by his policy argument."

When the Staggers Act amendments were promulgated, Congress apparently was persuaded that the Commission should be able to set terms to protect the public from interrupted service. The Staggers Act, (Section 10905(c)-(f)), contains a "cram-down", as suggested by Commissioner Klapp, whereby the Commission will set a binding price. Section 10905(c)-(f) originated as Section 202(c) of Senate bill S. 1946. The Senate Report of this bill echoes Chairman Klapp's concerns.

> "Section 202(c) deals with the purchase or subsidization of rail lines which have been approved for abandonment * * * The Commission now has the power to stay the effective date of an abandonment for 6 months while negotiations to subsidize or purchase a line are conducted. However, if such negotiations are not successful, the abandonment becomes effective at the end of 6 months. Thus, a railroad unwilling to consider subsidy or sale of the line can frustrate the intention of Section 10905 of 49 U.S.C. by simply refusing to negotiate in good faith." S.Rep. No. 96-470, 96th Congress., 1st Sess. 40 (1979); and see H.R. Rep. No. 96-1430, 96th Cong., 2d Sess. 125 (1980). (The Conference Report accompanying the Staggers Act in its final form indicated that the Senate provision in Section 202 was adopted by the Congress.)

It is tenable that the purpose of the cram-down was the reaction of Congress to a railroad industry that was abandoning lines without good faith bargaining, as contemplated

by the 4-R Act, between railroad and the affected public. It is untenable that Congress by enacting the cram-down to protect the public from interrupted rail service meant to preempt state eminent domain authority to acquire rail lines in order to recommence rail service after abandonment. This conclusion is supported explicitly by the Interstate Commerce Commission.

C. The Interstate Commerce Commission And The Courts Have Agreed That The Staggers Act Has No Preemptive Effect On The Exercise of Eminent Domain On Abandoned Rail Property.

1. The ICC has authoritatively construed the Staggers Act amendments to the Interstate Commerce Act as permitting acquisition of abandoned rail lines under state eminent domain authority.

It is well established that in questions of statutory construction, the interpretation of the agency charged with administration of the statute is entitled to great deference. *Red Lion Broadcasting v. FCC*, 395 U.S. 367, 381 (1969). *See also Miller v. Youakim*, 440 U.S. 125, 145, n. 25 (1979). This deference is particularly necessary where, as here, the agency is taking the first step toward implementing a new approach to regulatory reform mandated by Congress. *Udall v. Tallman*, 380 U.S. 1, 16 (1965); *Atchison, Topeka & Santa Fe Railway v. ICC*, 580 F.2d 623, 629 (D.C. Cir. 1978), and is particularly mandated "when it involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion; of making the parts work efficiently and smoothly while they are yet untried and new." *Norwegian Nitrogen Products Co. v. United States*, 288 U.S.

294, 315 (1933) (per Justice Cardozo). The court of appeals recognized that deference is to be given to the Interstate Commerce Commission, the agency entrusted in enforcing the Interstate Commerce Act (J.S.App., A8). But instead of referring the matter to the agency, the Eighth Circuit grounded its decision, in part, on what it "believed" was the agency's position.[8] The court of appeals' interpretation was incorrect.

The Commission was recently asked by the State of Wisconsin to find that the court of appeals' decision in this case was incorrect, i.e. that a state power of eminent domain may be exercised on abandoned rail lines after the provisions of Section 10905 have been satisfied. Wisconsin was concerned that the court of appeals decision would prevent it from exercising its sovereign power of eminent domain to acquire abandoned rail lines. By statute Wisconsin is prohibited from acquiring rail property through the procedures of Section 10905, but can only acquire property that has been certified abandoned under Section 10903. Wis. Stat. §85.09 (West 1982) (set forth in J.S.App., A66). Property acquired through the procedures of Section 10905 avoids abandonment under Section 10903.

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[8] The court of appeals remarked:

"We do not believe, however, that the Commission has interpreted Section 10905 in the manner in which the appellants contend" (J.S.App., A8).

"We do not believe that this language amounts to a declaration that a party who has invoked Section 10905 may also invoke state condemnation proceedings" (J.S.App., A10).

"Similarly, we do not believe that *Finance Docket No. 28990F, Common Carrier Status of State, State Agencies and Instrumentalities, and Political Subdivisions*, 363 I.C.C. 132 (1980) aff'd *sub. nom. Simmons v. Interstate Commerce Commission*, 697 F.2d 326 (D.C. Cir. 1982) compels a different conclusion (J.S.App., A10).

The Commission responded:

> "We wish to point out to WisDot that after all conditions to an abandonment have been complied with and the certificate is effective, federal interest and Commission jurisdiction end." *C&NW Transp.—Abandonment—in Waukesha, Jefferson and Dane Counties, Wisc.*, I.C.C. Docket No. AB-1 (Subd.-No. 144) (May 5, 1983) (*Waukesha*) (set forth in appendix to Appellants Joint Supplemental Memorandum to Jurisdictional Statement, at A5).

This Commission "interpretation gains much persuasiveness from the fact that it was the Commission which suggested the provisions enactment to Congress." *United States v. American Trucking Ass'n*, 310 U.S. 534, 549 (1940). See discussion at 18-19, *supra*, on the Commission part in enacting §10905.

2. The Commission has drawn a bright line: a rail line before an abandonment is the subject of federal interest and Commission jurisdiction but after a certificate issues it is no longer subject to Commission jurisdiction or federal interest.

The Commission has "exclusive" and "plenary" authority over abandonments, *Chicago and North Western Transportation Company v. Kalo Brick and Tile Company*, 450 U.S. 311, 320, 321 (1981), but this authority ends after the abandonment is consummated. Before consummation of the abandonment, ICC jurisdiction and federal interest persist. After issuance of the certificate of abandonment, ICC jurisdiction and federal interest end. The procedures set forth in Section 10905 are, accordingly, the exclusive method to acquire a rail line from the period that the notice of abandonment is

published in the Federal Register until the certificate issues.[9] However, once the certificate issues the property is no longer rail property and is subject to the traditional exercise of the sovereign power of eminent domain. *Waukesha, supra,* is the most recent of a line of ICC decisions addressing the boundary of Commission jurisdiction over abandoned rail lines.

In *Finance Docket No. 28990F, Common Carrier Status of States, State Agencies and Instrumentalities and Political Subdivisions,* 363 I.C.C. 132 (1980), aff'd *sub. nom. Simmons v. ICC,* 697 F.2d 326 (D.C. Cir. 1982), the Commission stated that "when a rail line has been fully abandoned, it is no longer a rail line and the transfer of the line is not subject to our jurisdiction". The court of appeals attempts to distinguish this language by stating that there is a difference between Commission jurisdiction and frustrating the congressional objective in enacting Section 10905. As discussed above, at 16-20, the congressional objective in Section 10905 has nothing to do with prohibiting the exercise of eminent domain upon abandoned rail lines. Section 10905 was enacted in order to force the nation's railroads to negotiate in good faith with interested parties to encourage continued rail service. The distinction offered by the court of appeals that there is a difference between ICC jurisdiction and congressional objectives leads to the anomalous result that an abandoned rail line is outside the ambit of federal jurisdiction and beyond the power of state eminent domain forever. In effect, the court of appeals has created a special class of property that is owned unfettered by federal regulation or state process. This special class of property gives to the owner, the CNW, one attribute of sovereignty, thereby creating " a void in the republic".

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[9] See discussion at 5-6, *supra,* concerning the procedures dictated by Section 10905.

The Commission promulgated rules under Section 10905 in *An Abandonment of Rail Lines and Discontinuance of Service*, 365 I.C.C. 249, 261 (1981) (49 C.F.R. 1121) and noted that it had been granted only limited jurisdiction under Section 10905 that requires sale and continued rail service.

> "In all other instances, the disposition of rail property after an effective certificate of abandonment has been exercised is a matter beyond the scope of the Commission's jurisdiction, and within the state's reserved jurisdiction. Questions of title to, and disposition of property are matters subject to state law."

The court of appeals' attempt to discount this language of the Commission as being responsive only to the very narrow question whether lessors of property along the rail line are entitled to the right of first refusal to buy the property is unconvincing. (J.S.App., A10).

The quoted Commission statement was made in the context of Section 10905 offers of financial assistance (*id.* at 257). As such, this statement has general applicability to Commission jurisdiction and federal interest after abandonment. Moreover, this language is consistent with other Commission pronouncements on this subject and, accordingly, is the considered wisdom of the Commission. The above Commission regulations also addressed the concerns of the Association of American Railroads (AAR) that "[n]othing prevents a state from exercising its rights under the Staggers Act and then walking away from the proceeding or decision of the Commission regarding the valuation or purchase price, and beginning a condemnation proceeding in a local state court seeking favorable treatment by such court." (This statement is set forth in the J.S.App., A38). The AAR suggested that prospec-

tive State purchasers who make an offer for a rail line under §10905 be required to make a 25% non-refundable deposit to the carrier to discourage them from obtaining an ICC valuation, and thereafter walking away (49 U.S.C. 10905(f)(2)) to commence state condemnation proceedings. The ICC rebuffed this suggestion as discriminatory against states and effectively eliminating their right to "walk away". It is significant that the exact issue raised here was posed to the Commission and the Commission gave no relief from the present situation that the AAR desired to forestall by the imposition of an economic barrier. The court of appeals ignored this by simply stating "that this does not demonstrate that the Commission agreed with the Association's (or the appellants') interpretation of the statute" (J.S.App., at A10).[10]

3. The courts have assumed that rail lines are subject to the legitimate processes of state law after a certificate of abandonment issues.

In a recent Seventh Circuit decision, *Chicago and North Western Transportation Co. v. United States*, 678 F.2d 665 (1982) (per Judge Posner), the court was called upon to fathom the meaning of the term "fair market value," under the 1980

[10] *See also, Modern Handcraft, Inc.—Abandonment in Jackson County, Missouri*, 363 I.C.C. 969 (1981), where the Commission once again articulated that the purpose of its "exclusive" and "plenary" jurisdiction over abandonments was to provide the public with a method of protection against cessation of rail service. The Commission observed that it would "not allow our jurisdiction to be used to shield a carrier from the legitimate processes of State law where there is no overriding Federal interest in interstate commerce." The court of appeals endeavored to distinguish *Modern Handcraft* as that decision concerned condemnation for a non-rail use, not for continued rail service (J.S.App., A9).

Staggers Rail Act Amendments to 49 U.S.C. §10905. In the course of its decision the court assumed that the power of eminent domain is left intact by the Staggers Act amendments *id.*, at 667. This assumption appears to have been determined after careful analysis by the court and is logically necessary to the conclusion reached. The court of appeals' characterization of the Seventh Circuit assumption as dictum is correct but does not relegate that dictum from its scholarly base to a mere meaningless remark.

Similarly, the District of Columbia Circuit in *Simmons v. Interstate Commerce Commission*, 697 F.2d 326, 331 (D.C. Cir. 1982) has cited approvingly Commission rules that instruct that the Commission lacks "jurisdiction to regulate state acquisition of abandoned rail line, since by the process of abandonment the line lost its status as rail property." *Simmons* involved the limited exemption from common carrier status under the Interstate Commerce Act to states that merely own rail lines and provide financial assistance to service carriers. *Simmons* found that the Staggers Act amendments to Interstate Commerce Act were in furtherance of the congressional policy of placing the states at the forefront of retaining local rail service (*id.* at 329). Under this view every effort of a state to preserve rail service—whether before or after abandonment—is to be encouraged.[11]

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[11] Other courts when confronted with the issue whether state process can be exercised on a rail line have indicated that a state is powerless to exercise jurisdiction until the certificate of abandonment issues. See e.g., *Kansas City Area Transportation Authority v. Ashley*, 555 S.W.2d 9 (Mo. 1977), *cert. denied*, 434 U.S. 1066 (1977); *New Orleans Terminal Company v. Spencer*, 366 F.2d 160 (5th Cir. 1966), *cert. denied*, 386 U.S. 942 (1967). These cases are pre-Staggers Act.

D. The interpretation of the court of appeals that the Staggers Act impliedly ousts the states from exercising their traditional power of eminent domain authority over real property, a power that was present under previous law, is flawed because the court of appeals failed to differentiate pre-abandonment and post-abandonment federal interest.

Preemption occurs when a state statute obstructs the "accomplishment and execution of the full purposes and objectives of an Act of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). By exercising a granted power, Congress may supersede state law by stating that it is the congressional intent to preempt state law. *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission*, 461 U.S. ——, 103 S.Ct. 1713, 1722 (1983). When Congress enacted the Staggers Act amendments to Section 10905, the question of the continued vitality of state eminent domain authority over abandoned rail lines was not addressed. Preemption may be found nonetheless by implication (*id.*). The court of appeals found that the precise time schedule dictated under Section 10905 evidenced a pervasive federal response demonstrating an intent by Congress that Section 10905 provide the exclusive mechanism for transfer of the Hayfield segment.

Citing and quoting from the leading and recent decisions of this Court, the court of appeals found that a state condemnation 1) conflicts with the federal scheme; 2) stands as an obstacle to the full purposes and objectives of Congress; and 3) reveals the same purpose as Section 10905 (J.S.App., A4-A7). The court of appeals reached its flawed conclusion that state eminent domain authority is preempted by failing

to distinguish between pre-abandonment and post-abandonment federal interest. The scheme embodied in Section 10905 pervasively operates within the pre-abandonment period. Section 10905 does not extend the duration of ICC authority; it does extend more power to the Commission during an interval in which the ICC has traditionally exercised preemptive power.

Before a certificate of abandonment is effective, the ICC has exclusive and plenary authority. *Chicago & North Western Transp. Co. v. Kalo Brick & Tile*, 450 U.S. 311, 320 (1981). Once the certificate is effective the federal interest is at an end. When the state condemnation action is commenced the federal scheme will have run its course. In these circumstances, there is no actual conflict.[12]

The Solicitor General states that "the abandonment authority of the Interstate Commerce Commission does not extend beyond the point at which the certificate of abandonment becomes effective" and no federal interest is endangered by a state condemnation of an abandoned rail line. *Amicus* Brief of the Solicitor General filed in response to the Court's invitation for the view of the United States at the jurisdictional level, at 6. In short, the state condemnation does not conflict

[12] The court of appeals found that the benefit of the 110 day time period would be lost (J.S.App., A-7). This benefit would not be lost, as the abandonment is not delayed by a state condemnation—condemnation follows abandonment. A railroad is able to cease operations on "unprofitable" lines and escape operating costs, the primary purpose of Section 10905, at the same time whether a state condemnation action is instituted or not. The court also thought that a condemnation would circumvent the benefit of the ICC valuation (J.S.App., A8). The benefit of the ICC valuation is not an issue of preemption but one of issue preclusion. Whether the ICC valuation is entitled to res judicata, collateral estoppel, or weight of some lesser force is not before the Court.

with federal law or stand as an obstacle to the accomplishment of any federal object.

In addition, there is not an identity of state and federal purpose embodied in the two schemes. The federal scheme is designed to have rail property avoid abandonment. A purchase pursuant to the procedures mandated by Section 10905 keeps the rail line within ICC jurisdiction. The line continues charged with common carrier obligations. In contrast, the state scheme affects property that has not avoided abandonment (an abandoned segment)—i.e. ordinary real property. Before an abandoned segment can be returned to service, a fresh certificate of public convenience and necessity must issue anew from the ICC. 49 U.S.C. (Supp. V) 10901. Additionally, the very property that is acquired is different. A purchaser pursuant to the provisions of 10905 acquires the same incidents of title in the rail line that the abandoning railroad possessed. For example, where the abandoning railroad title is subject to a condition that ownership remain in the railroad for so long as the property is used for rail purposes, the Section 10905 acquirer obtains title subject to the same condition. In a state condemnation, the railroad and all persons and entities that appear on title of record are joined as parties and the condemnor, after paying just compensation, obtains title in fee simple absolute.

The federal and state laws are harmonious. This Court has instructed that when federal law is exercised for one purpose, state law undertaken for a different but consistent purpose is not preempted. *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440, 445-46 (1960). Accordingly, where, as here, the federal and state scheme may be reconciled, the proper approach is to harmonize the schemes and not to oust the state

law. *Merrill Lynch, Fenner & Smith v. Ware*, 414 U.S. 117, 127 (1973); *DeCanas v. Bica*, 424 U.S. 351, 357 n.5 (1976). The federal and state schemes here compel reconciliation as a matter of statutory construction and preemption analysis. Furthermore, as a matter of sound policy it would be unwise to permit the court of appeals holding to stand.

E. The Court of Appeals' Holding That a Rail Line That is Abandoned is Beyond State Condemnation Authority When That Authority is Invoked to Restore Rail Service is Unsound in Law as it is in Principle.

An abandoned rail line is no longer rail property; it is ordinary property. By insulating this property from condemnation, the court of appeals has created a new class of property. The Solicitor General found this to be startling and unwise. Brief of Solicitor General, at Jurisdictional Statement level, at 10-11. Under the court of appeals' rationale, the Hayfield segment can be sold for railroad purposes, if the CNW chose, but may not be condemned by state authority for the same purpose. This same property, however, could be condemned by state eminent domain authority for any number of non-rail purposes, including a scenic railroad under the court's rationale.[13] This result is anomalous. Moreover, it will frustrate both interests of the sovereign states and the federal government.

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[13] While the holding of the court of appeals is that state eminent domain authority is preempted when this authority is attempted to be exercised on abandoned rail line in order to continue rail service on that line (J.S.App., A2), the court held open the question whether this authority would be similarly preempted when the purpose of the exercise of eminent domain is a public use other than a rail use. (J.S.App., A9). The rationale of the court of appeals would appear to arguably extend to a non-rail public use.

The Eighth Circuit decision severely undercuts state rail banking efforts. Many states now have programs in which abandoned rail lines are acquired and set aside for rail use in the future. Any rail line abandoned through the procedures dictated by Section 10905 would be exempted from a condemnation acquisition for rail banking purposes. As Section 10905 requires the line to continue in rail use. Section 10905 does not permit the dormancy contemplated by rail banking.[14] Under this holding, an important state objective is thwarted. Moreover, the federal interest in placing the states at the forefront of the federal effort to restore rail service is frustrated. *Simmons, supra,* at 697 F.2d 329. This policy is encouraged by federal funding.[15]

The court of appeals' decision ignores the practical reasons why a state would not always be able to participate in a Section 10905 acquisition. The most obvious example is statutory prohibitions that some states have, as Wisconsin does, that prohibits a State from acquiring a rail line prior to consummation of the abandonment. Wisc. Stat. 85.09 (West 1982) (J.S.App., A66). Furthermore, a State may wish to remain the purchaser of last resort or refrain from competing with a private entity in a Section 10905 acquisition.

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[14] Rail banking does not fit the public use definition of Section 10906, since it is a rail use.

[15] *See* 4-R Act, Pub. L. No. 94-210, §§501-509, 805, 90 Stat. 31, 66-76, 139-43; Staggers Act, Pub. L. No. 96-448, §§401-402, 404-406, 94 Stat. 1895, 1939-45, 1945-47, cited in *Simmons, supra,* at 697 F.2d 329, n.13.

CONCLUSION

The judgment below should be reversed and the case remanded to the district court to fashion an appropriate remedy.

Respectfully submitted.

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